BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
THE OPINION OF THE COURT BELOW

This petition prays for a review of the judgment entered in case No. 2587 in the Circuit Court of Appeals for the Tenth Circuit on January 6, 1943 (T. 41-45), not yet reported in the Federal Court Reporter system. No petition for rehearing was filed.

II.
JURISDICTION

1. The ground on which the jurisdiction of this Court is invoked is Judicial Code 240, as amended by Act of February 13, 1925, c. 229 ,Sec. 1 (43 Stat. 938), 28 U. S. C. A. 347, providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Court of Appeals.

2. The findings of fact and conclusions of law in this case show that the nature of the case and of the rulings below were such as to bring the case within the scope of the provision relied on (See Findings of Fact and Conclusions of Law, T. 32-33).

3. This case is of the utmost gravity to the State of Oklahoma. It involves the constitutionality of the Act of

Congress of June 20, 1936 (49 Stat. L. 1542), and the amendatory Act of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a). Under the holding of the Circuit Court below the solvency of a large number of counties and school districts within the State of Oklahoma is threatened. Although Oklahoma, with two-thirds of the Indian population of the United States, is the State most seriously affected, many other states have also been prejudiced.

III.

STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit have already been set forth in the foregoing petition, which is adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are constitutional.

2. The Circuit Court of Appeals erred in holding that the Acts of Congress in question are applicable to the lands here involved.

a. The Circuit Court of Appeals erred in holding that Jefferson Harrison (who possessed a Seminole allotment at the time the lands in question were purchased for him) was in the category of persons entitled to receive the benefits

of Act of Congress of June 20, 1937 (49 Stat. L. 1542), and the amendatory Act of Congress of May 19, 1937 (50 Stat. L. 188, 25 U. S. C. A., Sec. 412a).

b. The Circuit Court of Appeals erred in holding that Jefferson Harrison, who had conveyed said lands herein involved, and had retained a life estate therein, was still entitled to the benefit of the exemption under said Federal Acts.

3. The Circuit Court of Appeals erred in holding that the right of the Indian to assert the immunity granted by the Federal Acts herein involved to recover the taxes alleged to have been wrongfully collected, and to free the same from future taxation did not depend upon State procedural requirements.

4. The Circuit Court of Appeals erred in permitting the government to recover the ad valorem taxes which had been paid on the lands in question by Jefferson Harrison, a full-blood Seminole Indian, after expiration of the time prescribed by statute for the filing of a claim for refund or for maintaining an action therefor.

5. The Circuit Court of Appeals erred in adhering to the views of the majority opinion in the case of *Board of County Commissioners* v. *Seber,* 130 Fed. (2d) 663, and basing its conclusions herein upon the conclusions reached in that case.

V.

ARGUMENT

SUMMARY OF ARGUMENT

1. The Acts of Congress in question are unconstitutional because the Congress of the United States cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

2. The Act of Congress of June 20, 1937 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of Congress of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads) are not applicable to the lands here involved.

(a) The Acts apply only to an Indian who had never had a homestead prior to the purchase of property for him out of his restricted funds; said Acts have no application to an Indian (such as the Seminole at bar), who had been the beneficiary of allotted lands, and thus was possessed of a homestead long before property was purchased for him out of his restricted funds.

(b) The Acts do not even purport to apply to anything except "* * * [homestead] lands, the TITLE to which is NOW held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian * * *."

3. The court is without jurisdiction because the taxes should have been paid under protest and suit should have been brought within the time prescribed by statute; or, as an alternative, an affidavit of erroneous assessment should have been filed; and, in any event, the action to recover the taxes was barred by the statute of limitations three years after said taxes were paid.

ARGUMENT IN CHIEF

PROPOSITION I.

The Acts of Congress in question are unconstitutional because the Congress of the United State cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of the person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

At the outset we wish to call the Court's attention to the manner in which the Circuit Court of Appeals disposed of this question in the case at bar. From the opinion of the court, at page 42 of the transcript, we quote the following:

> *"Under facts closely analogous, the principal questions involved here were presented to and decided by this court in Board of County Commissioners* v. *Seber, 130 Fed. (2d) 663 (one judge dissenting). The judgment of the trial court, entered prior to our decision in the Seber case, followed the judgment of the trial court in that case, 38 Fed. Supp. 731, which we modified, and as modified, affirmed.* Except in respects presently noted, we deem it unnecessary to state in detail the analogous facts on this record, or to state the reasons upon which our conclusions were based in the former case. *It is sufficient*

to say that in so far as applicable, we adhere to the view of the majority in the Seber case, and our conclusions here upon these facts are based upon the conclusions reached there.

"In the Seber case, we held the 1936 Act, as amended by the 1937 Act, constitutionally valid as a proper exercise of the power of the national government to legislate for and on behalf of its Indian wards, principally on the grounds that the power to purchase lands for the Indian ward, and to restrict the same against alienation without the consent and approval of the Secretary of the Interior, carried with it the power to free the same from state taxation by expressly declaring them tax-free Federal instrumentalities."

The majority opinion of the Circuit Court in the Seber case purports to dispose of the constitutional question in the following language (130 Fed. [2d] 670):

> "The exemption granted here is based upon the power of the Federal Government to create a Federal instrumentality out of lands heretofore taxable by the State of Oklahoma, and to immunize them against taxation."

The above statement was made by the court without citation of authority. More serious is the fact that the above statement begs the question. Of course, the Federal Government can—in pursuance of a bona fide constitutional purpose—create a Federal instrumentality, immune from state taxation. But it is the position of the State of Oklahoma that the Federal Government cannot, for purposes of exemption from state taxation, create a "Federal instrumentality" out of a person or property of an individual merely because such individual is possessed of a quantum of Indian blood.

There is dictum in the case of *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 72 L. ed. 709, which may appear to support the majority opinion of the Circuit Court. The following unfortunate language was used in that case:

> "The construction to be placed on these decisions is that the lands now in question, and hence the interest of the lessee in them are not such instrumentalities of government as will be declared immune from taxation in the absence of an express exemption by congress * * *."

But since when has Congress ever had the power to confer immunity from taxation on a person by turning him into a Federal instrumentality, even though some Indian blood be involved? Whence came this Circe-like power? The commerce clause of the Constitution (Art. 1, § 8), provides that Congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes * * *." This is a far cry from granting exemption from state taxation to individuals who happen to have a quantum of Indian blood.

On principle, the use of a concept "Federal instrumentality" in connection with individuals possessed of some Indian blood, constitutes an abuse no less serious than the use of the concept of "freedom of contract" in connection with certain regulatory measures. Neither of these two concepts are to be found in the Constitution. Both may, on occasion serve a useful purpose. The Supreme Court, as now constituted, has recognized that "freedom of contract" has too often been used to arrive at decisions which could not be sus-

tained by the language of the Constitution or the logic of events. The phrase "freedom of contract" has lost its place in the abracadabra of constitutional ritual, and societal control is no longer to be confined by such an incantation. Now let the jargon of legalistic conjuration be further delimited by stripping the "instrumentality" gloss from the simple constitutional reference to Indian Tribes.

Upon the recurrent use in our case law of the term "Federal instrumentality" we are moved to insert an observation in a recent (concurring) opinion by Mr. Justice Frankfurter (*Tiller* v. *Atlantic Coast Line Co.*, 87 S. Ct. No. 8, p. 454), wherein it was said:

> "* * * an excellent illustration of the extent to which uncritical use of words bedevils the law * * *. A phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula undiscriminatingly used to express different and sometimes contradictory ideas * * *."

Helvering v. *Mountain Producers Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, has pointed the way to rectification of the boundaries of tax exemption on lands affected by Indian rights. It has an indirect bearing on the present validity of the dictum in *Shaw* v. *Gibson-Zahniser Oil Corp.*, *supra*, to which reference has been made. That case involved land purchased for a full-blood enrolled Creek Indian from the accumulated royalties of a departmental lease of his restricted and allotted lands. The Court held that said lands were subject to ad valorem taxation and in the opinion rendered by Justice (now Chief Justice) Stone, the Court said:

"In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process. *But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation.* To hold them immune would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility. There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks (citing cases)."

And in said case the Court further said:

"* * * Neither leases of * * * [restricted allotted or tribal] lands, *Indian Territory Illuminating Oil Co.* v. *Oklahoma* * * *, nor the exploitation of the land by the lessee, *Howard* v. *Gypsy Oil Co.* * * *, *Large Oil Co.* v. *Howard* * * *, *Choctaw O. & G. R. Co.* v. *Harrison* * * *, *Jaybird Min. Co.* v. *Weir* * * *, nor his income from the lease, *Gillespie* v. *Oklahoma* * * *, may be taxed by the state."

But in *Helvering* v. *Mountain Producers Corp., supra,* the Court said:

"We are convinced that the rulings in *Gillespie* v. *Oklahoma* * * *, and *Burnett* v. *Coronado Oil & Gas Co.*, are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

And further:

> "We have always recognized that no constitutional implications prohibit a non-discriminatory tax upon the property of an agent of the government merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency."

And here is a point to be stressed: To hold, in *Helvering* v. *Mountain Producers Corp., supra,* that certain cases were "out of harmony with correct principle," necessitated an outright overruling of those cases: but to hold that a certain dictum in *Shaw* v. *Gibson-Zahniser, supra,* is "out of harmony with correct principle," requires nothing so drastic. The Seber case and this case present, for the first time, the opportunity for this Court to pass upon the power of Congress to render lands exempt from state taxation where treaty or tribal rights are not involved. The cases sustaining tax exemption have dealt with lands allotted to individuals out of tribal holdings, and those lands were exempt from taxation under treaties executed between the Indian Tribes and the United States before Oklahoma acquired statehood. Naturally, Oklahoma entered upon statehood subject to vested treaty rights.

But questions of tribal lands and treaty rights do not arise in the case at bar. The mere fact that Jefferson Harrison is of Indian blood does not place him in any special constitutional category. The lands in question were taxable in the hands of his predecessor in title. To refer to the landowner, Jefferson Harrison, as a "Federal instrumentality"

is certainly the *reductio ad absurdum* of the "instrumentality" concept.

For a critical approach to traditional constitutional concepts, we quote the following language, incorporated in *Erie* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817:

> "I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has often been advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now, erroneously, repeated the same doctrine. But notwithstanding the frequency with which the doctrine has been repeated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the states—independence of their legislative and independence of their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and to that extent, a denial of its independence."

The majority opinion of the Circuit Court in the Seber case has stressed provisions in the Enabling Act and the Oklahoma Constitution which relate to Indian property rights and the authority of the United States to regulate such rights. Such provisions have no application here. They are to be

read in the light of the conditions obtaining at the time of the admission of the State of Oklahoma into the Union.

At the time of the admission, a considerable amount of land within the boundaries of Oklahoma was subject to tax exemption by virtue of treaties made by the United States with Indian Tribes. Naturally, the United States had no right to violate its treaty obligations. The United States had no right to make any agreement with Oklahoma that would impair those treaty obligations. Oklahoma knew what those treaty obligations were, and assumed the status of statehood with full knowledge of their provisions. Thus Oklahoma entered upon statehood subject to certain tax exemptions, the extent of which was clearly defined and well known to the Indians, the United States and Oklahoma. It was exemption of this character which has been many times upheld by the Supreme Court of the United States. *Choate* v. *Trapp*, 224 U. S. 665.

It must be emphasized that the tax exemption, under consideration at the time of the Enabling Act and the Oklahoma Constitution, attached to certain definite and specific tribal lands. The fact that the ownership of such tribal lands was, at that time, in process of passing from ownership in common to ownership in severalty, is not material, because the change in character of ownership could not extend the boundaries of the tax-exempt land beyond the limits which had been agreed upon by the United States, Oklahoma and the Indians.

At this point we think it worth while to call the Court's attention to Section 1 of the Oklahoma Enabling Act, which reads as follows:

> "Admission of Oklahoma and Indian Territory as State. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that *nothing contained in said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories* (so long as such rights shall remain unextinguished) *or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.*"
>
> (34 Stat. L. 267).

And likewise to Section 6, Article 10 of the Oklahoma Constitution, which reads, in part, as follows:

> "* * * All property owned by the Murrow Indian Orphan Home, located in Coal County, and all property owned by the Whittaker Orphan Home, located in Mayes County, so long as the same shall be used exclusively as free homes or schools for orphan children, and for poor and indigent persons, and all fraternal orphan homes, and other orphans homes, together with all their charitable funds, shall be exempt from taxation, *and such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws* * * *."

The above quoted provisions were considered in *United States* v. *Board of Com'rs of McIntosh County*, 271 Fed. 747

(affirmed 284 Fed. 103, 263 U. S. 689 [No. 178]). The following syllabi are quoted from that case—5th syllabus:

> "Const. Okla., art. 10, S. 6, exempting from taxation property exempt by reason of treaty stipulations existing between Indians and the government, or by federal laws during the force and effect of such treaties or laws, obviously exempts such lands only as were exempt under treaties and laws in existence when the state was admitted."

9th syllabus:

> "The provisions of the Oklahoma Enabling Act and Constitution exempting from taxation property belonging to or thereafter purchased by the United States and all Indian property exempted by existing treaties or laws do not exempt from taxation lands theretofore taxable, after their purchase by the Secretary of the Interior for a full-blood Creek Indian, to be held under the same restrictions on alienation as were imposed on the lands from which the purchase price was derived as oil royalties or proceeds of sale."

It has always been recognized that a territory—in seeking to be admitted into the Union as a state—must yield to existing vested property rights. Thus Oklahoma was bound to respect vested Indian rights to tax exemption at the time statehood was acquired.

But it has likewise always been recognized that no state can bargain away its authority in regard to property to which no vested rights as to tax immunity had attached at time of statehood. To hold otherwise would be to deprive the affected state of its right to come into the Union "on an equal footing with the original states" (*State of Oklahoma* v. *A. T. & S. F. Ry. Co.*, 220 U. S. 277, 31 S. Ct. 434.

A specific tax exemption on specific lands, originally tribal in character, was the only type of tax exemption ever considered. It was the only type of tax exemption that could possibly be valid. It is important that this issue not be confused with the power of the United States to impose RESTRICTIONS on its Indian wards. The power of the United States to make judgments as to the degree of competence possessed by individual Indians cannot be challenged by a state. That is a matter between the United States and the individual Indian. That power is not dependent upon any acquiescence by a state in its Enabling Act or its Constitution; no state in the Union can escape its exercise. Oklahoma's situation in that respect is not inferior to the situation of any other state.

Never has the Supreme Court of the United States held that PURCHASED lands, other than those of a tribal character, could be rendered tax-exempt by mere fiat of Congress, simply because they were owned by an individual Indian, or because restricted funds of an Indian grantor were used in their purchase.

Prior to the passage of the 1936 and 1937 Acts of Congress the law seemed to be absolutely settled that lands such as are involved in this suit were subject to taxation by the State. *United States* v. *Ransome,* 263 U. S. 691; *McCurdy* v. *United States,* 246 U. S. 263; *United States* v. *Gray,* 284 Fed. 103; *Shaw* v. *Gibson-Zahniser Oil Corp., supra; U. S.* v. *Mummert,* 15 Fed. (2d) 926.

If the power exists in Congress to declare lands which were previously taxable by the State, to be non-taxable, when purchased by Indians, by declaring them Federal instrumentalities, then the power certainly exists in Congress to destroy the entire state or any political subdivision thereof by declaring other classes of citizens to be instrumentalities of the Federal Government. We have in this country a large number of citizens who are dependent in various forms for their existence to the Federal Government. There are those who are sustained by the WPA, the AAA, and various other governmental agencies. If the Congress can go this far in making Indian lands exempt from taxation by mere fiat that such lands are Federal instrumentalities, it logically might follow that property owned by one on the WPA, by co-operation in the AAA, or various other governmental projects, which look toward the relief of various classes of citizens, can similarly be declared instrumentalities of the Federal Government and exempt from taxation. Lands originally taxable within a given state, if subject to exemption by Congress, could never be made the basis of local government with that degree of safety and permanence contemplated by the inherent principle of state taxation for the support of government. It is obvious, in support of this statement, that with the vast fund at the disposal of the Federal Government, the entire taxable property in a given school district could be so purchased with restricted Indian funds and thereby removed from state and local taxation to the extent that a state of paralysis would exist so far as the maintenance

of government and local education is concerned. Such action on the part of the Federal Government, as is attempted under the 1936 and 1937 congressional acts here involved, is a rank invasion of the sovereignty of the State of Oklahoma.

One of the ablest discussions of this question is contained in the opinion of the District Court of the United States in the case of *United States* v. *Swain County, North Carolina,* 46 Fed. (2d) 99. Although this case was later reversed by the Circuit Court of Appeals, in *United States* v. *Wright,* 53 Fed. (2d) 300 (relied upon by respondent), it was reversed specifically on the ground that the trial court had made an error in finding that the lands in question in that suit were held in the name of the individual Indian rather than in the Federal Government. The syllabus therein contained, which is pertinent to our discussion, is as follows:

> "Federal statute attempting to exempt from taxation lands of 'Eastern Band of Cherokee Indians' in North Carolina, *held* unconstitutional, state of North Carolina having exclusive power to exempt lands within its borders from taxation."

This was a suit in equity brought by the United States against the sheriff and other officers of Swain County to enjoin the duly constituted authorities from the collection of taxes assessed by them for state and county purposes against the lands of the Eastern Band of Cherokee Indians. The defendants for reply asserted that the Act of Congress, 43 Stat. 376, attempting to exempt these lands from taxation was void and unconstitutional. The act contains this provision:

"That such restricted and undivided property shall be exempt from sale for unpaid taxes for two years from the date when such taxes become due and payable."

The court in its opinion said:

"Has congress the power to exempt these lands from state and county taxes? * * * In the Articles of Confederation of 1777 the states were careful to give to the congress the power, only, to regulate 'trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.' It is, therefore, clear that the states which banded themselves together and won their freedom from Great Britain understood that the lands within their borders, occupied by Indians, belonged to these individual states, and congress could only manage the affairs of the Indians and regulate their trade when such Indians were not members of any of the respective states * * *.

"In the well-considered case of *Union P. Railroad Co.* v. *Peniston*, 18 Wall. 29, 21 L. ed. 787, the Supreme Court of the United States, in an opinion by Justice Strong, well and clearly stated:

" 'That the taxing power of the state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within the territorial boundaries of the state, except so far as it had been surrendered to the Federal Government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax lands belonging to the states, we have declared that it is indispensable to their continued existence * * *. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except

what may be absolutely necessary for executing the state's inspection laws * * *. The states are, and they must ever be, co-existent with the National Government Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise.

"Counsel for complainant contends that the winding up of the tenancy in common of these Indians is in some way an instrumentality of the government, and he cites in support of that contention the famous case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, 4 L. ed. 579; but I cannot find support for this contention in the opinion of Chief Justice Marshall in this famed case * * *.

"It will be seen that even in this case where an instrumentality of the government, to-wit: the United States Bank, owned real estate within the State of Maryland, the Chief Justice holds that the State of Maryland could levy a tax upon its real estate.

"In the case of *Union P. Railroad Co.* v. *Peniston*, referred to above, the Supreme Court held that although a railroad corporation chartered by Congress, which Congress assisted by donations and loan, of whose board of directors the government appoints two, and which makes annual reports to the government, and whose railroad and telegraph lines are subject to the regulations imposed by its charter, and subject to such further regulations as Congress may make, and to which the Congress has donated many millions of dollars, and to which Congress makes grants of land, and that said railroad should transmit dispatches and transport mails, troops and munitions of war, supplies and public stores for the government whenever required to do so by any department thereof, such corporation is not an instrumentality of the government to the extent that its real estate may not be taxed by the State of Nebraska. It cannot be argued with force that the ownership of a few thousand acres of mountain land in Swain County, N. C., by a

small band of Indians, is in any sense an instrumentality of the government.

"* * * The land on which they now live, according to my conception, was never owned by the Federal government, and the President and Senate have never made any treaty with this band providing that their land should be exempt from state and county taxation. I cannot see, therefore, that the levying of taxes by Swain County on these lands at the same rates that other lands are assessed in that county can in any way be regarded as a tax burden on an instrumentality of the government of the United States * * *.

"* * * but the fact that they are wards of the government gives no more right to exemption from taxation than would be given to wards of other guardians scattered throughout North Carolina. There are many orphans throughout the state who have guardians, but the Federal government has no power to exempt their lands from taxation. There are many flood sufferers and earthquake victims throughout the United States and the world, to whose relief the Federal government has contributed money; but certainly it could not be argued that the lands which such sufferers might own within the boundaries of the various states could be exempted by the Federal government from state taxation. Surely it cannot be argued that an Indian or an Indian tribe or family could go into the various states either actually or by an agent, and purchase with personal funds rural lands or city lots and claim exemption from state taxation by reason of the fact that they are Indians. Nor could Congress exempt such lands from state taxation. *The particular character of a citizen of the United States or of a state does not take away from the several states the sovereign power of taxing his lands within their respective boundaries, unless such lands were donated, allotted, and set apart to such individual by the Federal government from and out of Federal lands or public domain* * * * (Italics ours).

"It is contended by counsel for complainant, in his brief, that:

"'From this legislation it is the policy of Congress where it is deemed necessary for the proper protection of the property of the Indians and the right of the United States to supervise their property and affairs, to exempt their lands and property from taxation.'

"This statement is undoubtedly true with reference to all lands in the public domain which were assigned to Indians by the United States, but *I can find no instance in all the writings on Indian affairs, or in the multitude of judicial opinions, where the Congress has ever undertaken to exempt land from taxes where such land has been purchased by Indians, from the state, as in the case at bar* * * * (Italics ours).

"For the foregoing reasons I am compelled to conclude and hold that the act of Congress of June 4, 1924, in so far as it attempts to exempt those Cherokee lands from state and county taxation, is unconstitutional and void."

This case was reversed by the Circuit Court of Appeals in 53 Fed. (2d) 300, the Circuit Court finding that the trial court erred on the point of who actually held title to the lands involved. In this connection the Circuit Court said:

"And it should be noted that what we have here is not *as was thought by the court below,* a tax levied upon the property of the wards of the government, but an attempt to tax property which had been deeded to the government itself to be used by it in behalf of its wards in the exercise of a power given it by the constitution. The power to tax is the power to destroy, and if the tax here can be sustained this property held by the government for a constitutional purpose can be destroyed in its lands."

Thus it will be seen that the reversal, by the Circuit Court, was not an overthrow of the strong and logical doc-

trine enunciated by the trial court, but went off upon considerations of fact.

The Court's further attention is directed to the case of *Ashton et al.* v. *Cameron County Water Improvement District No. One,* 298 U. S. 511, 80 L. ed. 1309, wherein the Supreme Court of the United States, in an opinion by Mr. Justice McReynolds, said:

> "The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation."

There must be something more than a mere fiat of Congress to make the lands involved here something necessary for the carrying out of the Government of the United States. If the lands in question were government property, used for government purposes, plan or project, then there may be some merit to the Circuit Court's decision in the case at bar (and the Seber case) in sustaining the constitutionality of the 1936 and 1937 Federal Acts involved herein, but this property is not held in the name of the United States or in trust by the United States. It was not purchased with government money, the government has no interest in it, nor any control over it, except that it cannot be alienated or encumbered by the Indian without the consent of the Secretary of the Interior. The government does not attempt to reimburse the State of Oklahoma for the loss of taxes resulting from the exemption. When the Secretary of the Interior purchased, or permitted the purchase by the Indian wards of

lands which had formerly been taxable by the State and its political subdivisions, knowing that they had been so taxable, he must have realized that he was purchasing or permitting the Indian to purchase such lands with the taxable burden upon them, as such lands were purchased long before the 1936 and 1937 Federal Acts were passed.

We, therefore, respectfully submit that in view of the foregoing, the Act of June 20, 1936, and the amendment thereof on May 19, 1937, are unconstitutional as invading the sovereignty of the State of Oklahoma by depriving it of its revenue and its power of taxation of lands heretofore taxable.

PROPOSITION II.

The Act of Congress of June 20, 1936 (which deals with lands purchased out of an individual Indian's own restricted funds), and the Act of Congress of May 19, 1937 (which amends said 1936 Act by limiting it to homesteads) are not applicable to the lands here involved.

1. The Acts apply only to an Indian who had never had a homestead prior to the purchase of property for him out of his restricted funds; said Act have no application to an Indian (such as the Seminole at bar) who had been the beneficiary of allotted lands, and thus was possessed of a homestead long before property was purchased for him out of his restricted funds.

Because of the fact that so large a proportion of the Oklahoma Indians have been the beneficiaries of allotted

lands, there has been a tendency, in this part of the country, to overlook the fact that large numbers of American Indians were not included in the treaties made by the United States with Indian tribes, relative to land distribution.

On behalf of certain American Indians who were "landless," a program of land purchase was entered upon some years ago. The Acts in question relate to that program. When the Act of June 20, 1936, was considered on the floor of the Senate, Senator Elmer Thomas referred to the program as follows:

> "The recommendation or assertion was made to the Indians that the land would be theirs and they would have no taxes to pay * * *. In some cases tax warrants have been issued and the Indians have been threatened with dispossession. The department believes that in order to keep faith with the Indians, the tax warrants and tax assessments should be paid * * *. The bill (Act of June 20, 1936), authorized the appropriation of money for that purpose" (Congressional Record, *supra*).

It was quickly found, however, that the Act of June 20, 1936, was entirely too broad and indiscriminate. Much of the property which had been bought for "landless" Indians was producing an income ample for the payment of taxes, and certain Indians deliberately allowed taxes to accumulate, relying on the bounty of the government. The circumstances demanded the imposition of a limitation. Said Senator Thomas:

> "Since the passage of said Act of June 20, 1936 (49 Stat. L. 1542), it was found the provisions of Section 2 thereof * * * would exempt from taxation vast quantities of property such as * * * *farm lands which are not homesteads, etc.*"

Therefore, Section 2 of the Act of June 20, 1936, was stricken and a substitute Section 2 was furnished for said Act by the amendment of May 19, 1937, containing the following provision:

> "Sec. 2. All *homesteads* heretofore purchased out of the trust or restricted funds of individual Indians are hereby declared to be instrumentalities of the Federal Government and shall be non-taxable * * *. The Indian * * * shall select * * * either * * * lands * * * or city property * * * to be designated as a homestead."

As to the type of homestead which can be designated under state law (31 O. S. 1941, § 1), we are, of course, not here concerned. But at the time of the passage of the Acts in question, Jefferson Harrison was in possession of the homestead which he had theretofore selected out of his allotted lands. In other words, he already had a homestead which had come to him by virtue of his rights as an Indian. As a result, he never had been in a position to select a "homestead" out of lands purchased for him out of his restricted funds. Therefore, all of his "purchased" lands, including the land in question here, were of the character designated by Senator Thomas as "farm lands which are not homesteads;" thus, they are among the properties which were covered in the 1936 Act, but excluded by the 1937 amendment thereto.

To hold otherwise would be to say that a man may have two homesteads at one and the same time. Such a position would be contrary to all law on the subject of "homesteads" and contrary to common sense. *Bouse* v. *Stone*, 162 Pac. 439; *Watson* v. *Manning*, 56 Okla. 295, 156 Pac. 184; *Northwest Thresher Co.* v. *McCarroll*, 30 Okla. 25, 118 Pac. 352. In accord are Alabama, California, Georgia, Illinois, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, South Dakota, Texas, Wisconsin. It would appear that a contrary holding is absolutely unheard of. Furthermore, such a position would be contrary to both the letter and the spirit of the Acts in question. They are obviously designed to protect an Indian who—but for the purchase of lands out of his restricted funds—would never have had a homestead.

2. **The Acts do not even purport to apply to anything except "* * * (homestead) lands, the TITLE to which is NOW held by an Indian * * *, heretofore purchased out of trust or restricted funds of SAID Indian * * *."**

It cannot be too strongly emphasized that the tax exemption does not apply to lands in which the purchaser (out of restricted funds) retains a mere interest, such as an estate for life.

> "The word 'interest,' as applied to property, is broader than the word 'title.' It is practically synonymous with the words 'estate.'"
>
> *Windincamp* v. *Phoenix Ins. Co. of Brooklyn*, 62 S. E. 478, 4 Ga. App. 759.

The distinction between "title" and a lesser estate has been set forth by the courts as follows:

> "The word 'title' as defined by the Century Dictionary, means 'ownership; absolute ownership; the unincumbered fee.'"
>
> *Langmede* v. *Weaver,* 60 N. E. 992, 997, 65 Ohio St. 17.

> "Seven years' possession by the grantees of a life tenant * * * will not bar the remaindermen; for the word 'title' means a fee-simple title, or one that equity will convert into a fee-simple, and the possessor had only a limited fee."
>
> *McDowell* v. *Beckham,* 130 Pac. 350, 352, 72 Wash. 224.

> "The word 'title,' when used in reference to title to real estate, implies an estate in fee. Nothing short thereof is a complete title."
>
> *Gillespie* v. *Broas* (N. Y.), 23 Barb. 370, 381.

> "'Title' means full, independent and fee ownership."
>
> *In re. Pelis' Estate,* 271 N. Y. S. 731, 150 Misc. 918.

> "The 'title' meant the legal estate in fee, free and clear of all valid claims, liens and incumbrances whatsoever. It is the ownership of the land *dominium directum et absolutum,* without any rightful participation by any other person in any part of it. If the plaintiff's wife had a contingent life estate in one-third part of the farm, the defendant had not a clear and absolute title."
>
> *Jones* v. *Gardner* (N. Y.), 10 Johns. 266, 269.

Strict Construction Should Be Given Federal Statutes Granting Tax Exemption

It would require an exceedingly liberal construction to sustain the Acts in question even where the Indian had the title. Certainly the Acts cannot be extended to include a mere interest such as the estate for life involved in the case at bar. Strict construction should be given to tax exemption provisions of Federal Acts.

The majority opinion of the Circuit Court in the case of *Board of County Com'rs of the County of Creek* v. *Seber*, 130 Fed. (2d) 670, said:

> "*But unlike lands allotted in severalty to members of the Five Civilized Tribes, under an agreement or treaty, providing for immunity from taxation until removed by the terms of the agreement or treaty, tax immunity here depends upon the express will of Congress, and must be found within the plain terms of the legislation relied upon to effect the exemption,*"

and in the minority opinion in the Seber case, *supra*, it is said:

> "*But as to legislative matters arising since April 26, 1931, the general rule as to strict construction applies, that is, to follow the manifest working of the statute and to be determined from the surrounding circumstances and the language or words from which a conclusion reasonably and necessarily follows. Choate* v. *Trapp*, 224 U. S. 65; *Blundell* v. *Wallace*, 267 U. S. 372; *Cully* v. *Mitchell*, 37 Fed. (2d) 493; *Choteau* v. *Burnett*, 283 U. S. 691; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 571; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514."

Notwithstanding the fact that the court in the Seber case announced the rule of strict construction, it applied the liberal rule in that case as well as in the case at bar.

We wish to point out that the underlying factor for the liberal rule of construction on tax exemption in favor of Indians was the *property right* to such exemption which became vested in the Indians under the treaties with the Federal Government which guaranteed to them that all their allotted lands should be non-taxable, while title remained in the original allottees, but not to exceed twenty-one years from the date of patent. The United States had the power to grant this *property right* to the Indians at the time it was granted by treaty, and it became fully vested in them when they accepted the patents to the allotted lands.

When the Constitution of Oklahoma was adopted, a provision was included therein, excepting from taxation "such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws" (see Article 10, Section 6, Oklahoma Constitution).

Bear in mind that the course of legislation enacted by Congress discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward, to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon

him both the responsibilities and the privileges of the owner of property, including the duty of paying taxes. It has been the policy of Congress at all times to place the Indian on the same footing as other citizens of the community or state in which the Indian resides and this construction has repeatedly been given the Acts of Congress by our Federal Courts and the Supreme Court of the United States. See *Blundell* v. *Wallace*, 267 U. S. 372, 69 L. ed. 664; *Cully* v. *Mitchell*, 37 Fed. (2d) 493; *Board of County Commissioners of Tulsa County* v. *United States*, 94 Fed. (2d) 450, and *Choteau* v. *Burnett*, 283 U. S. 691, 75 L. ed. 1353.

We contend that after April 26, 1931, Congress had fulfilled its treaty obligations to the members of the Five Civilized Tribes in so far as the provisions relating to the non-taxability of the Indian lands were concerned. Any Acts of Congress passed before April 26, 1931, or after April 26, 1931, which purposed to reimpose restrictions on lands of the Indians of the Five Civilized Tribes, or purported to exempt from taxation any lands after said date, should be given the same strict construction as any legislative act of the state which attempts to grant tax exemptions on real or personal property of any other citizen.

In other words, after April 16, 1931, Acts of Congress, which purport to exempt from taxation by the states lands of members of the Indian tribes, should be strictly instead of liberally construed (treaty guarantees of non-taxable status for Indian lands having expired) by the courts,

and no tax exemption should be allowed unless it is shown that it comes clearly within the provisions of the law under which the exemption is claimed. We believe it is the duty of this Court to adopt the rule of strict construction in interpreting Section 2 of the Act of June 20, 1936, *supra*. By applying such a rule the Court must come to the conclusion that the lands involved herein do not fall within the purview of the Act of June 20, 1936, and its amendment of May 19, 1937, and, therefore, could not be instrumentalities of the Federal Government and non-taxable under the provisions of Section 2 of said Act.

PROPOSITION III.

The court is without jurisdiction because the taxes should have been paid under protest and suit should have been brought within the time prescribed by statute; or, as an alternative, an affidavit of erroneous assessment should have been filed; and, in any event, the action to recover the taxes was barred by the statute of limitations three years after said taxes were paid.

The record discloses that the lands involved herein were taxed for the years 1936, 1937 and 1938, and this suit was instituted by the United States, respondent herein, in the United States District Court for the Eastern District of Oklahoma on September 19, 1941, on behalf of said Jefferson Harrison. The United States, as well as the said Jefferson Harrison, are precluded from the recovery of the taxes paid for the reason that said Indian paid said taxes voluntarily

and without protest, more than three years next preceding the filing of this action. In this connection, the Court's attention is directed to Section 12665, O. S. 1931, which was in full force and effect at the time these taxes were paid, which section provides, in part:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the * * * taxes at the time * * * provided by law, and shall give notice * * * that suit will be brought * * *. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit to recover * * *, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if * * * the court determine that the taxes were illegally collected, * * * the court shall render judgment showing the correct and legal amount of taxes due such person, and * * * the collecting officer shall pay to such person the excess * * *."

Under the above section it is observed that unless service of summons has been had on the officer collecting the taxes within 30 days after payment thereof under protest, the taxpayer is thereafter barred from instituting and maintaining any action for the recovery of his taxes.

In the case of *Antrim Lumber Co.* v. *Sneed,* 175 Okla. 47, 52 Pac. (2d) 1941, the third and fifth paragraphs of the syllabus are as follows:

> "In this jurisdiction a suit for the recovery of illegal taxes is deemed to be in effect a suit against the state

and consent to the maintenance of such a suit has been granted by Sec. 12665, O. S. 1941 (Sec. 9971, C. O. S. 1921), and thereby the taxpayer is provided with an adequate, speedy and exclusive remedy in all cases where the illegality of the tax is alleged to arise by reason of some action from which the law provides no appeal.

"When a taxpayer fails to pursue the statutory remedy provided for the recovery of illegal taxes, he may not thereafter maintain an action to recover said taxes on the theory that payment thereof was made involuntarily and under compulsion."

The Tenth Circuit Court, in effect, recognizes the application of the thirty-day statute of limitation as to ad valorem taxes in the case of *Sneed* v. *Shaffer Oil & Refining Co.*, 25 Fed. (2d) 21.

It is our opinion that the statute of limitations and mandatory preliminary requirements as to said procedure applies in the case at bar. In *Broadwell* v. *Board of Commissioners of Bryan County*, 88 Okla. 147, 211 Pac. 1040, certiorari denied, 262 U. S. 750, 67 L. ed. 214, it was held that statute of limitations in such a case constituted a bar to the parties thereto.

In the case of *Ward* v. *Board of County Commissioners of Love County*, 253 U. S. 17, the Supreme Court of the United States recognized the right of the State of Oklahoma, or Love County, to plead the statute of limitations in an action by an Indian citizen to recover taxes paid.

To say the least, if the thirty-day prohibition against bringing the suit for the recovery of taxes under Section

12665, *supra,* is held not to apply, then the three-year statute of limitations, as provided by Section 101, O. S. 1941, is applicable.

In the case of *Carter* v. *Collins,* 174 Okla. 4, 50 Pac. (2d) 203, the Supreme Court held a civil action for a recovery of money as a refund for the recovery of gross production taxes illegally exacted from allotted lands of a citizen of the Choctaw Tribe of Indians to be such a civil action as was intended to be barred by the three-year statute of limitations, as provided by Section 101, O. S. 1941.

In the Antrim Lumber Company case, *supra,* the Court held that the remedy provided by 12665, *supra,* was not restricted to ad valorem taxes, but was applicable to all taxes and therefore applied to gross production taxes.

The Circuit Court, in the case at bar in its opinion, at page 43 of the transcript, said:

> "In the former case, we had not occasion to pass upon the application of the state statute of limitations to suits of this character, since under our holding in that case the suit for the recoverable taxes was commenced within the prescribed limitations. But the inapplicability of state statute of limitations to suits by the government on behalf of Indians in this class of cases is to well established to warrant comment here. *Board of County Commissioners* v. *Jackson,* 308 U. S. 343, 351; *United States* v. *Dewey County, supra; Board of Commissioners of Caddo County* v. *United States, supra; United States* v. *Nez Perce County, supra; Board of Commissioners of Bryan County* v. *United States, supra.*"

We wish to point out, however, that in Justice Williams' dissenting opinion in the Seber case he expressed the view that the statute of limitations was applicable under such circumstances.

CONCLUSION

It is, therefore, respectfully submitted that the decision of the United States Circuit Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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April, 1943.

In the Supreme Court of the United States

OCTOBER TERM 1942

No. 900

MUSKOGEE COUNTY, OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the circuit court of appeals sought to be reviewed was entered January 6, 1943 (R. 45). The petition for certiorari was filed April 8, 1943. It was consequently not filed until after the expiration of the three-months' period prescribed by section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940, 28 U. S. C. sec. 350. The petition is accordingly out of time and should be either denied or dismissed for want of jurisdiction.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APRIL 1943.

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